

## SENATE BILL NO. 35

## INTRODUCED BY ESP

BY REQUEST OF THE CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A PUBLIC DEFENDER BE APPOINTED AT THE BEGINNING OF A PETITION FOR ANY CHILD ABUSE AND NEGLECT PROCEEDING; AND AMENDING SECTIONS 41-3-422, 41-3-423, 41-3-432, AND 41-3-607, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION.** **Section 1. Right to counsel.** (1) Any party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings held pursuant to the petition.

(2) The court shall immediately appoint counsel for:

(a) any indigent parent, guardian, or other person having legal custody of a child or youth in a removal, placement, or termination proceeding pursuant to 41-3-422;

(b) any child, youth, or guardian ad litem involved in a proceeding under a petition filed pursuant to 41-3-422; and

(c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act.

**Section 2.** Section 41-3-422, MCA, is amended to read:

**"41-3-422. Abuse and neglect petitions -- burden of proof.** (1) (a) Proceedings under this chapter must be initiated by the filing of a petition. A petition may request the following relief:

(i) immediate protection and emergency protective services, as provided in 41-3-427;

(ii) temporary investigative authority, as provided in 41-3-433;

(iii) temporary legal custody, as provided in 41-3-442;

(iv) long-term custody, as provided in 41-3-445;

(v) termination of the parent-child legal relationship, as provided in 41-3-607;

(vi) appointment of a guardian pursuant to 41-3-444;

(vii) a determination that preservation or reunification services need not be provided; or

(viii) any combination of the provisions of subsections (1)(a)(i) through (1)(a)(vii) or any other relief that

1 may be required for the best interests of the child.

2 (b) The petition may be modified for different relief at any time within the discretion of the court.

3 (c) A petition for temporary legal custody may be the initial petition filed in a case.

4 (d) A petition for the termination of the parent-child legal relationship may be the initial petition filed in  
5 a case if a request for a determination that preservation or reunification services need not be provided is made  
6 in the petition.

7 (2) The county attorney, attorney general, or an attorney hired by the county shall file all petitions under  
8 this chapter. A petition filed by the county attorney, attorney general, or an attorney hired by the county must be  
9 accompanied by:

10 (a) an affidavit by the department alleging that the child appears to have been abused or neglected and  
11 stating the basis for the petition; and

12 (b) a separate notice to the court stating any statutory time deadline for a hearing.

13 (3) Abuse and neglect petitions must be given highest preference by the court in setting hearing dates.

14 (4) An abuse and neglect petition is a civil action brought in the name of the state of Montana. The  
15 Montana Rules of Civil Procedure and the Montana Rules of Evidence apply except as modified in this chapter.  
16 Proceedings under a petition are not a bar to criminal prosecution.

17 (5) (a) Except as provided in subsection (5)(b), the person filing the abuse and neglect petition has the  
18 burden of presenting evidence required to justify the relief requested and establishing:

19 (i) probable cause for the issuance of an order for immediate protection and emergency protective  
20 services or an order for temporary investigative authority;

21 (ii) a preponderance of the evidence for an order of adjudication or temporary legal custody;

22 (iii) a preponderance of the evidence for an order of long-term custody; or

23 (iv) clear and convincing evidence for an order terminating the parent-child legal relationship.

24 (b) If a proceeding under this chapter involves an Indian child, as defined in the federal Indian Child  
25 Welfare Act, 25 U.S.C. 1901, et seq., the standards of proof required for legal relief under the federal Indian  
26 Child Welfare Act apply.

27 (6) (a) Except as provided in the federal Indian Child Welfare Act, if applicable, the parents or parent,  
28 guardian, or other person or agency having legal custody of the child named in the petition, if residing in the  
29 state, must be served personally with a copy of the initial petition and a petition to terminate the parent-child legal  
30 relationship at least 5 days before the date set for hearing. If the person or agency cannot be served personally,

1 the person or agency may be served by publication as provided in 41-3-428 and 41-3-429.

2 (b) Copies of all other petitions must be served by certified mail. If service is by certified mail, the  
3 department must receive a return receipt signed by the person to whom the notice was mailed for the service  
4 to be effective. Service of the notice is considered to be effective if, in the absence of a return receipt, the person  
5 to whom the notice was mailed appears at the hearing.

6 (7) If personal service cannot be made upon the parents or parent, guardian, or other person or agency  
7 having legal custody, the court shall ~~appoint~~ immediately provide for appointment of an attorney as provided in  
8 [section 1] to represent the unavailable party ~~when, in the opinion of the court, the interests of justice require.~~

9 (8) If a parent of the child is a minor, notice must be given to the minor parent's parents or guardian,  
10 and if there is no guardian, the court shall appoint one.

11 (9) (a) Any person interested in any cause under this chapter has the right to appear. Any foster parent,  
12 preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing the petition  
13 of all judicial hearings for the child and must be given an opportunity to be heard. The right to appear or to be  
14 heard does not make that person a party to the action. Any foster parent, preadoptive parent, or relative caring  
15 for the child must be given notice of all reviews by the reviewing body.

16 (b) A foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child  
17 who has cared for a child who is the subject of the petition who appears at a hearing set pursuant to this section  
18 may be allowed by the court to intervene in the action if the court, after a hearing in which evidence is presented  
19 on those subjects provided for in 41-3-437(4), determines that the intervention of the person is in the best  
20 interests of the child. A person granted intervention pursuant to this subsection is entitled to participate in the  
21 adjudicatory hearing held pursuant to 41-3-437 and to notice and participation in subsequent proceedings held  
22 pursuant to this chapter involving the custody of the child.

23 (10) An abuse and neglect petition must:

24 (a) state the nature of the alleged abuse or neglect and of the relief requested;

25 (b) state the full name, age, and address of the child and the name and address of the child's parents  
26 or guardian or person having legal custody of the child;

27 (c) state the names, addresses, and relationship to the child of all persons who are necessary parties  
28 to the action.

29 ~~(11) The court may at any time on its own motion or the motion of any party appoint counsel for any~~  
30 ~~indigent party. If an indigent parent is not already represented by counsel, counsel must be appointed for an~~

~~indigent parent at the time that a request is made for a determination that preservation or reunification services need not be provided.~~

(11) Any party in a proceeding pursuant to this section is entitled to counsel as provided in [section 1].

(12) At any stage of the proceedings considered appropriate by the court, the court may order an alternative dispute resolution proceeding or the parties may voluntarily participate in an alternative dispute resolution proceeding. An alternative dispute resolution proceeding under this chapter may include a family group decisionmaking meeting, mediation, or a settlement conference. If a court orders an alternative dispute resolution proceeding, a party who does not wish to participate may file a motion objecting to the order. If the department is a party to the original proceeding, a representative of the department who has complete authority to settle the issue or issues in the original proceeding must be present at any alternative dispute resolution proceeding.

(13) Service of a petition under this section must be accompanied by a written notice advising the child's parent, guardian, or other person having physical or legal custody of the child of the:

(a) right, pursuant to [section 1], to request the appointment of counsel if the person is indigent or if appointment of counsel is required under the federal Indian Child Welfare Act, if applicable;

(b) right to contest the allegations in the petition; and

(c) timelines for hearings and determinations required under this chapter.

(14) If appropriate, orders issued under this chapter must contain a notice provision advising a child's parent, guardian, or other person having physical or legal custody of the child that:

(a) the court is required by federal and state laws to hold a permanency hearing to determine the permanent placement of a child no later than 12 months after a judge determines that the child has been abused or neglected or 12 months after the first 60 days that the child has been removed from the child's home;

(b) if a child has been in foster care for 15 of the last 22 months, state law presumes that termination of parental rights is in the best interests of the child and the state is required to file a petition to terminate parental rights; and

(c) completion of a treatment plan does not guarantee the return of a child.

(15) A court may appoint a standing master to conduct hearings and propose decisions and orders to the court for court consideration and action. A standing master may not conduct a proceeding to terminate parental rights. A standing master must be a member of the state bar of Montana and must be knowledgeable in the area of child abuse and neglect laws."

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2       **Section 3.** Section 41-3-423, MCA, is amended to read:

3       **"41-3-423. Reasonable efforts required to prevent removal of child or to return -- exemption --**  
4 **findings -- permanency plan.** (1) The department shall make reasonable efforts to prevent the necessity of  
5 removal of a child from the child's home and to reunify families that have been separated by the state.  
6 Reasonable efforts include but are not limited to voluntary protective services agreements, development of  
7 individual written case plans specifying state efforts to reunify families, placement in the least disruptive setting  
8 possible, provision of services pursuant to a case plan, and periodic review of each case to ensure timely  
9 progress toward reunification or permanent placement. In determining preservation or reunification services to  
10 be provided and in making reasonable efforts at providing preservation or reunification services, the child's  
11 health and safety are of paramount concern.

12       (2) Except in a proceeding subject to the federal Indian Child Welfare Act, the department may, at any  
13 time during an abuse and neglect proceeding, make a request for a determination that preservation or  
14 reunification services need not be provided. If an indigent parent is not already represented by counsel, the court  
15 shall immediately appoint counsel ~~must be appointed by the court at the time that a request is made for a~~  
16 ~~determination under this subsection to represent the indigent parent in accordance with the provisions of [section~~  
17 1]. A court may make a finding that the department need not make reasonable efforts to provide preservation  
18 or reunification services if the court finds that the parent has:

19       (a) subjected a child to aggravated circumstances, including but not limited to abandonment, torture,  
20 chronic abuse, or sexual abuse or chronic, severe neglect of a child;

21       (b) committed, aided, abetted, attempted, conspired, or solicited deliberate or mitigated deliberate  
22 homicide of a child;

23       (c) committed aggravated assault against a child;

24       (d) committed neglect of a child that resulted in serious bodily injury or death; or

25       (e) had parental rights to the child's sibling or other child of the parent involuntarily terminated and the  
26 circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care  
27 for the child at issue.

28       (3) Preservation or reunification services are not required for a putative father, as defined in 42-2-201,  
29 if the court makes a finding that the putative father has failed to do any of the following:

30       (a) contribute to the support of the child for an aggregate period of 1 year, although able to do so;

(b) establish a substantial relationship with the child. A substantial relationship is demonstrated by:

(i) visiting the child at least monthly when physically and financially able to do so; or

(ii) having regular contact with the child or with the person or agency having the care and custody of the child when physically and financially able to do so; and

(iii) manifesting an ability and willingness to assume legal and physical custody of the child if the child was not in the physical custody of the other parent.

(c) register with the putative father registry pursuant to Title 42, chapter 2, part 2, and the person has not been:

(i) adjudicated in Montana to be the father of the child for the purposes of child support; or

(ii) recorded on the child's birth certificate as the child's father.

(4) A judicial finding that preservation or reunification services are not necessary under this section must be supported by clear and convincing evidence.

(5) If the court finds that preservation or reunification services are not necessary pursuant to subsection (2) or (3), a permanency hearing must be held within 30 days of that determination and reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(6) If reasonable efforts have been made to prevent removal of a child from the home or to return a child to the child's home but continuation of the efforts is determined by the court to be inconsistent with the permanency plan for the child, the department shall make reasonable efforts to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child. Reasonable efforts to place a child permanently for adoption or to make an alternative out-of-home permanent placement may be made concurrently with reasonable efforts to return a child to the child's home. Concurrent planning may be used.

(7) When determining whether the department has made reasonable efforts to prevent the necessity of removal of a child from the child's home or to reunify families that have been separated by the state, the court shall review the services provided by the agency including, if applicable, protective services provided pursuant to 41-3-302."

**Section 4.** Section 41-3-432, MCA, is amended to read:

**"41-3-432. Show cause hearing -- order.** (1) (a) Except as provided in the federal Indian Child Welfare

1 Act, a show cause hearing must be conducted within 20 days of the filing of an initial child abuse and neglect  
2 petition unless otherwise stipulated by the parties pursuant to 41-3-434 or unless an extension of time is granted  
3 by the court. A separate notice to the court stating the statutory time deadline for a hearing must accompany any  
4 petition to which the time deadline applies.

5 (b) The court may grant an extension of time for a show cause hearing only upon a showing of  
6 substantial injustice and shall order an appropriate remedy that considers the best interests of the child.

7 (2) The person filing the petition has the burden of presenting evidence establishing probable cause  
8 for the issuance of an order for temporary investigative authority after the show cause hearing, except as  
9 provided by the federal Indian Child Welfare Act, if applicable.

10 (3) At the show cause hearing, the court may consider all evidence and shall provide an opportunity for  
11 a parent, guardian, or other person having physical or legal custody of the child to provide testimony. Hearsay  
12 evidence of statements made by the affected child is admissible at the hearing. The parent, guardian, or other  
13 person may be represented by legal counsel and may be appointed counsel as provided for in [section 1]. The  
14 court may permit testimony by telephone, audiovisual means, or other electronic means.

15 (4) At the show cause hearing, the court shall explain the procedures to be followed in the case and  
16 explain the parties' rights, including the right to request appointment of counsel if indigent or if appointment of  
17 counsel is required under the federal Indian Child Welfare Act, if applicable, and the right to challenge the  
18 allegations contained in the petition. The parent, guardian, or other person having physical or legal custody of  
19 the child must be given the opportunity to admit or deny the allegations contained in the petition at the show  
20 cause hearing. Inquiry must be made to determine whether the notice requirements of the federal Indian Child  
21 Welfare Act, if applicable, have been met.

22 (5) The court shall make written findings on issues including but not limited to the following:

23 (a) whether the child should be returned home immediately if there has been an emergency removal  
24 or remain in temporary out-of-home care or be removed from the home;

25 (b) if removal is ordered or continuation of removal is ordered, why continuation of the child in the home  
26 would be contrary to the child's best interests and welfare;

27 (c) whether the department has made reasonable efforts to avoid protective placement of the child or  
28 to make it possible to safely return the child to the child's home;

29 (d) financial support of the child, including inquiry into the financial ability of the parents, guardian, or  
30 other person having physical or legal custody of the child to contribute to the costs for the care, custody, and

1 treatment of the child and requirements of a contribution for those costs pursuant to 41-3-446; and

2 (e) whether another hearing is needed and, if so, the date and time of the next hearing.

3 (6) The court may consider:

4 (a) terms and conditions for parental visitation; and

5 (b) whether orders for examinations, evaluations, counseling, immediate services, or protection are  
6 needed.

7 (7) Following the show cause hearing, the court may enter an order for the relief requested or amend  
8 a previous order for immediate protection of the child if one has been entered. The order must be in writing.

9 (8) If a child who has been removed from the child's home is not returned home after the show cause  
10 hearing or if removal is ordered, the parents or parent, guardian, or other person or agency having physical or  
11 legal custody of the child named in the petition may request that a citizen review board, if available pursuant to  
12 part 10 of this chapter, review the case within 30 days of the show cause hearing and make a recommendation  
13 to the district court, as provided in 41-3-1010.

14 (9) Adjudication of a child as a youth in need of care may be made at the show cause hearing if the  
15 requirements of 41-3-437(2) are met. If not made at the show cause hearing, adjudication under 41-3-437 must  
16 be made within the time limits required by 41-3-437 unless adjudication occurs earlier by stipulation of the parties  
17 pursuant to 41-3-434 and order of the court."

18  
19 **Section 5.** Section 41-3-607, MCA, is amended to read:

20 **"41-3-607. Petition for termination -- separate hearing -- ~~right to counsel~~ -- no jury trial.** (1) The  
21 termination of a parent-child legal relationship may be considered only after the filing of a petition pursuant to  
22 41-3-422 alleging the factual grounds for termination pursuant to 41-3-609.

23 (2) If termination of a parent-child legal relationship is ordered, the court may:

24 (a) transfer permanent legal custody of the child, with the right to consent to the child's adoption, to:

25 (i) the department;

26 (ii) a licensed child-placing agency; or

27 (iii) another individual who has been approved by the department and has received consent for the  
28 transfer of custody from the department or agency that has custody of the child; or

29 (b) transfer permanent legal custody of the child to the department with the right to petition for  
30 appointment of a guardian pursuant to 41-3-444.



(3) If the court does not order termination of the parent-child legal relationship, the child's prior legal status remains in effect until further order of the court.

~~(4) At the time that a petition for termination of a parent-child relationship is filed, parents must be advised of the right to counsel, and counsel must be appointed for an indigent party.~~

~~(5)~~(4) A guardian ad litem must be appointed to represent the child's best interests in any hearing determining the involuntary termination of the parent-child legal relationship. The guardian ad litem shall continue to represent the child until the child is returned home or placed in an appropriate permanent placement. If a respondent parent is a minor, a guardian ad litem must be appointed to serve the minor parent in addition to any appointed counsel requested by the minor parent.

~~(6)~~(5) There is no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship."

**NEW SECTION. Section 6. Notification to tribal governments.** The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell band of Chippewa.

**NEW SECTION. Section 7. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 41, chapter 3, part 4, and the provisions of Title 41, chapter 3, part 4, apply to [section 1].

**COORDINATION SECTION. Section 8. Coordination instruction.** If Senate Bill No. 146 [LC 214] and [this act] are both passed and approved, then [this act] ~~terminates on the effective date of [sections 15 and 29 through 32] in~~ Bill No. [LC 214] IS VOID.

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